IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 768 of 1984

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

MAHENDRASINGH BAIJNATHSINH & ORS.

MR.S.R.DIVETIA, APP, for the Appellant-State.
Respondent No.1 abated as per order dtd.8.11.93.
Mr.P.M.Vyas for Respondents No.2,3,5,6 & 7.
Mr.Nitin M. Amin, for Respondent No.4.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI
Date of decision: 11/07/96

ORAL JUDGEMENT (per PANCHAL, J.)

The judgment and order dated January 31, 1984, rendered by the learned Additional Sessions Judge, Mehsana, in Sessions Case No. 117 of 1983, acquitting the respondents of the offences punishable under Ss.307, 325, 323, 34 of the Indian Penal Code, and S.25(1A) of the Indian Arms Act, 1959, is assailed by the State of Gujarat in the present appeal which is instituted under S.378 of the Code of Criminal Procedure, 1973.

2. The prosecution case in brief is that complainant Motiram Keshavlal resides at Village Ambala, Dist. Mehsana alongwith his family members. During the night of July 18, 1983, when Motiram and other members of his family were sleeping, three miscreants entered his house through roof. As the roof was removed, noise had taken place and therefore, Motiram and other family members had awaken. Motiram asked his nephew Bhailalbhai to find out as to why noise had taken place. It is the case of the prosecution that the miscreants started beating the complainant and his nephew Bhailalbhai with wooden log. Therefore, Motiram and his nephew Bhailalbhai raised shouts. Thereupon, the miscreants are alleged to have fired three rounds from tamancha. One Chandulal Manilal, who was sleeping in the cabin which is situated just opposite the house of Motiram heard the noise of fire and therefore, got up and went to the house of the complainant. The prosecution has alleged that the miscreants also fired one shot at him, and therefore Chandulal started running towards the Village and raised shouts for help. Under the circumstances, persons of the village collected near the house of Motiram, and amongst them, one Dhanji was also present. As the miscreants were challenged, they ran away. Therefore complainant Motiram and some persons went in a tractor to chase the miscreants, whereas Dhanji and other persons went on foot in search of the miscreants, through the fields, following the foot-prints of the miscreants. The prosecution has alleged that when Dhanji and others

reached Village Runi, they spotted the miscreants and when Dhanji was at a distance of 10 feet, accused no.1 fired shots from tamancha, as a result of which Dhanji received injuries on chest. It is also the case of the prosecution that accused no.5 caused injury to Dhanji by means of a wooden log. Because of the injuries sustained by him, Dhanji fell down there, but some of the members of the search team continued to chase the miscreants further, who had fled from village Runi after causing injury to Dhanji. Ultimately, near the outskirts of Village Runi, accused no.2 and 3 were apprehended by the people of Village Runi. In the meanwhile, Police Jamadar Bhupatsinh of Mujpur Outpost received a wireless message from D.S.P., Patan that miscreants had run away towards Mujpur and other villages after committing dacoity in Village Ambala. On receiving this message, Police Jamadar Bhupatsinh alongwith two other police constables went in search of those miscreants in a private jeep. According to the prosecution case, police jamadar Bhupatsinh apprehended accused no. 1 and 4 from Village Jasda. Accused no.1 had a bag in his hand and in that bag there was one revolver, two tamanchas, some cartridges and clothes, whereas accused no.4 had also a bag with him from which clothes, wrist watches and Rs.826/- in cash were found out. Accused no. 1 and 4 were made to sit in jeep and while the jeep was passing through Village Runi, Police Jamadar Bhupatsinh learnt that accused no.2 and 3 were also apprehended by village people. Therefore, the police jamadar took accused no. 2 and 3 also in the jeep, and brought all the 4 accused to Sami Police Station. Police Jamadar Bhupatsinh handed over custody of accused no. 1 to 4 as well as the articles which were found from their possession to PSI Mr.Raval of Sami Police Station. PSI Mr.Raval thereafter summoned two panch witnesses, and it is the case of the prosecution that in presence of panch witnesses, revolver, tamanchas, cartridges, clothes, Rs.826/- in cash, etc. were seized. In the meantime, complainant Motiram learnt that Dhanji was injured at Village Runi, and therefore, he went there in a tractor. Injured Dhanji was first brought to Village Mujpur in the tractor, and was thereafter removed to the hospital at Sami for medical treatment. Dhanji was examined and treated by Dr.Sevantilal Sanghavi at Sami Hospital on July 19, 1983. Motiram went to the police station at Sami and lodged his complaint. Police Officer therefore registered the offence and investigation was commenced. Dhanji was referred to Patan Civil Hospital for X-ray and further examination by the Medical Officer of Sami Hospital. At Patan hospital, he was examined by Dr.Jashwant Shah on July 19, 1983. Medical examination

of Dhanji indicated that he had sustained fracture of ulna bone of left hand, and there were nearly 32 round lacerated small wounds on his chest, and therefore, he was referred to the Civil Hospital, Ahmedabad for further treatment. Injured Dhanji was admitted as an indoor patient in Civil Hospital, Ahmedabad. In the meantime, when PSI Mr.Jadeja of Harij Police Station was on night checking duty, he found two persons from a guest house situated at Harij. Mr.Jadeja arrested both of them and they are original accused no. 5 and 6. After arrest of accused no. 5 and 6, necessary information was conveyed by PSI Mr.Jadeja to other Police Officers of the district, and on receiving information PSI Mr.Raval of Sami Police Station, went to Harij Police Station and arrested accused no. 5 and 6 in connection with the complaint which was lodged by Motiram. PSI Mr.Raval thereafter wrote yadi to the Executive Magistrate of Harij for holding identification parade. It is the case of the prosecution that the Executive Magistrate of Harij held the identification parade of accused no. 1 to 6 on July 23, 1983 in presence of three panch witnesses, and accused no. 1 to 6 were identified by material prosecution witnesses. PSI Mr.Raval of Sami police station also learnt that accused no.7 was arrested by police in connection with the offence of dacoity at village Ambala and hence he got accused no.7 transferred in the case, which was registered on the strength of complaint of Motiram. After usual and necessary investigation, the accused were charge-sheeted under S.307, 325, 323, 34 of the I.P.Code and S.25(1A) of the Indian Arms Act. As the offence under S.307 of the I.P.Code is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court for trial.

3. The learned Addl. Sessions Judge, Mehsana, framed charge against the respondents under Ss.307, 325, 323, 34 I.P.Code and S.25(1A) of the Indian Arms Act, 1959. The Respondents pleaded not guilty to the charge, and claimed to be tried. The prosecution therefore, examined the following witnesses in order to prove its case against the respondents :

(1) Khodabhai Mohanbhai Parmar PW 1, Ex.13,
(2) Motiram Keshavlal PW 2, Ex.15,
(3) Dr.Sevantilal Dahyalal Sanghvi PW 3, Ex.17,
(4) Dr.Mahendra Jivabhai Mayatari PW 4, Ex.19,
(5) Bhupatsinh Udesinh PW 5, Ex.26,
(6) Dhanji Pashaji PW 6, Ex.27,
(7) Chandubhai Manilal Patel PW 7, Ex.28,
(8) Vasubhai Keshavbhai PW 8, Ex.29,
(9) Aniruddh Devshankar Dave PW 9, Ex.30,

(10) Abdulrehman Kasambhai PW 10, Ex.34,
(11) Trikamlal Dahyalal Thaker PW 11, Ex.37,
(12) Baldevbhai Prahladbhai PW 12, Ex.38,
(13) Chothaji Haraji PW 13, Ex.40,
(14) Devendrakumar Haribhai PW 14, Ex.42,
(15) Haridas Raghuvirdas PW 15, Ex.43,
(16) Vasantiben Mahadev PW 16, Ex.44,
(17) Virpal Mafatlal PW 17, Ex.45,
(18) Navalsinh Pratapsinh PW 18, Ex.48,
(19) Harivallabh Ishwarlal Raval PW 19, Ex.49,
(20) Jashwant Kantilal Shah, PW 20, Ex.53.

4. The prosecution also relied on documentary evidence such as complaint filed by Motiram, panchnama regarding identification parade, panchnama of the scene of offence, injury certificate of Dhanjibhai, etc. to prove its case against the respondents.

5. After recording of the evidence of the prosecution witnesses was over, the learned Judge recorded statements of the accused under S.313 of the Code of Criminal Procedure, 1973. In their statements, the respondents stated that the case against them was false, but did not lead any evidence in defence.

6. The learned Judge, on appreciation of evidence, recorded the following conclusions :

(i) The prosecution has established that Dhanjibhai received injuries in the field of Teba on the road leading from Kuvarad to Ranod.

(ii) The prosecution has proved that the injuries which were sustained by injured Dhanji on his chest were caused to him by fire from tamancha or gun-shot, and the injury which was sustained by him on the left arm was caused to him by blow of wooden log.

(iii) The evidence of complainant Motiram is of no help to the prosecution to connect the accused directly with the incident in which injured Dhanjibhai received injuries.

(iv) There are material contradictions in the depositions of injured Dhanjibhai and eye-witness Chandulal.

(v) Though injured Dhanjibhai was accompanied by other persons, no one is examined by the

prosecution to prove its case against accused no. 1 and 5.

(vi) Injured Dhanjibhai was not in a position to identify his assailants.

(vii) Though the fact that accused no. 1 and 4 were arrested near Village Jasda is proved, it is not proved that they were in possession of fire-arms contrary to the provisions of Indian Arms Act, 1959.

(viii) Evidence of Police Jamadar Bhupatsinh and Devendrabhai is full of material contradictions and does not inspire confidence of the court.

(ix) The fact that accused no. 2 and 3 were caught by people of Village Runi is of no consequence and does not connect them with the incident.

(x) So also, the fact that accused no. 5 and 6 were handed over to Mr.Raval, who was then discharging duties as PSI, Sami Police Station by Mr.Jadeja, PSI, Harij Police Station is of no consequence and does not establish their involvement in the incident at all.

(xi) Injured Dhanji was never asked to identify the accused at the test identification parade which was held by the Executive Magistrate and therefore, identification of accused no. 1 and 5 by Dhanjibhai in the court does not inspire confidence because they were not previously known to him.

(xii) The identification of accused no. 2, 3 and 7 by witness Chandulal is not reliable at all, and therefore, the prosecution has failed to prove its case against those accused.

(xiii) Similarly, the prosecution has failed to prove its case beyond doubt against accused no.7. Accused no.7 was never called upon to stand up in the test identification parade, and his arrest is of no consequence.

7. In view of the above referred to conclusions, the learned Judge acquitted the respondents by the impugned judgment, giving rise to the present appeal.

8. The appeal was placed for admission hearing

before the court on June 30, 1993, and after admitting it, bailable warrant in the sum of Rs.5,000/- was ordered to be issued against each of the respondents. Report of the serving Officer indicated that Respondent No.1 had expired. The said report was accepted by the court, and the appeal against Respondent No.1 was disposed of as having abated by the order dated November 8, 1993.

9. Mr.S.R.Divetia, ld.APP has taken us through the entire evidence on record. On behalf of the State Government, it was contended that injured Dhanji had full opportunity of identifying his assailants, and therefore, accused no.1 and 5 should have been convicted by the learned Judge under Ss.307, 325, 323, 34 of the I.P.Code and S.25(1A) of the Indian Arms Act. It was pleaded on behalf of the appellant that by leading cogent and reliable evidence, prosecution has proved its case beyond reasonable doubt, against the respondents and therefore, the present appeal deserves to be accepted.

10. Mr.P.M.Vyas, learned Counsel appearing for the respondents claimed that the respondents have not been properly identified by the prosecution witnesses, and as the finding recorded by the learned Judge to the effect that the prosecution has failed to establish involvement of the respondents in the incident is based on evidence, the same should not be interfered with by the court in the present acquittal appeal. The learned Counsel for the defence submitted that the respondents have been successful in probabilising their defence that they had come to Village Runi and other villages in search of work, and were falsely implicated in the case. Lastly it was argued that two views on evidence led by the prosecution are not possible and therefore, the acquittal appeal should be dismissed.

11. Though strictly speaking, the court is not required to consider the case against respondent no.1, as the appeal against him has abated. But rest of the respondents were also prosecuted under s.34 of I.P.code, and therefore, in order to decide the case against rest of the respondents, it is also necessary to consider the case against Respondent No.1 who has expired. Under the circumstances, the case against respondent no.1 is also examined by this court.

12. The fact that injured Dhanji received injuries on his chest, which were caused to him by fire from tamancha and another injury on his left hand which was caused to him by blow of wooden log is proved by the prosecution beyond any shadow of doubt. The above conclusion reached

by the learned trial Judge is based on appreciation of the evidence of injured Dhanjibhai as well as medical evidence. The fact that injured Dhanjibhai received injuries as indicated in the injury certificate is not seriously disputed in this appeal on behalf of the respondents.

13. However, the question arises as to who caused injuries to injured Dhanjibhai. Dhanjibhai in his evidence has specifically stated that when he was at a distance of 10 to 15 feet from the accused, accused no.1 had fired shots at him, as a result of which he sustained injuries on chest, whereas accused no.5 had given a blow with a wooden log. It is relevant to note that accused no.1 and 5 do not belong to the village to which Dhanjibhai belongs. As admitted by Dhanjibhai himself, they were never previously known to him. In his evidence, witness Dhanjibhai did not give description of any of his assailants. It is his case that immediately after firing shots from tamancha, the miscreants had run away. Therefore, he had no proper opportunity of observing the physiognomy of any of his assailants. Under the circumstances, the Investigating Officer should have afforded earliest opportunity to Dhanjibhai for proper identification of his assailants. Though identification parade was held by Executive Magistrate, Dhanjibhai was never offered opportunity to identify any of the assailants. Therefore, the question which arises for consideration of the court is whether identification of accused no. 1 and 5 by Dhanjibhai as his assailants in court should be believed or not ?

14. In the case of RAMESHWAR SINGH vs. STATE OF JAMMU AND KASHMIR, AIR 1972 SC 102, the Supreme Court has held as under :

" Before dealing with the evidence relating to identification of the appellant, it may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view, it is a matter of great importance both for the investigating agency and for the

> accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards are effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is thus and thus alone that justice and fairplay can be assured both to the accused and to the prosecution. The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicting the statement in court of the identifying witness."

15. It is an admitted position that the witnesses and more particularly Dhanjibhai were strangers to the accused. The evidence of Chandulal indicates that it was rainy day. No cogent evidence has been led by the prosecution to indicate that injured Dhanjibhai had clear vision of the action of the accused persons, in order that their features could get impressed in his mind to enable him to collect the same and identify the accused even after lapse of long time. On the facts and in the circumstances of the case, we are of the opinion that identification of accused no. 1 and 5 by injured Dhanjibhai, after a period of about six months in the court, does not inspire confidence, and is rightly disbelieved by the learned Judge who had the advantage of observing the demeanour of the witnesses.

16. Though the prosecution has placed reliance on the identification parade to prove its case against accused no. 1 and 5, the same is not reliable at all. Witness Chandulal claims that in the identification parade which was held by Executive Magistrate, he had identified

accused no. 2, 3 and 7; but the evidence of Executive Magistrate as well as the contents of panchnama of the identification parade, do not indicate in any manner that accused no.7 was asked to stand up in the queue, alongwith accused no. 1 to 6 for identification. Though in examination-in-chief witness Chandulal has stated that he does not know accused no.1 and 5 by name, and is in a position to identify them on seeing, he has immediately given the names of those accused. In the next breath, this witness has stated that he was not in a position to identify the accused who were apprehended by police. He has admitted in cross-examination that he had no opportunity of knowing any of the accused before the incident. Under the circumstances, the learned trial Judge cannot be said to have committed any error in not placing reliance on the evidence of this witness.

These are the only two witnesses who have been examined by the prosecution for identification of the accused. The view taken by the learned trial Judge that the prosecution has failed to prove identity of the accused, is based on appreciation of evidence, and we do not find any reason to interfere with the said finding of fact.

17. The submission that accused no.1 was found in possession of fire-arms contrary to the provisions of the Indian Arms Act, 1959, and therefore, should be convicted under S.25(1A) of the said Act has no merit. It is relevant to note that at the time when Police Jamadar Bhupatsinh Udesinh noticed revolver, tamanchas, cartridges, etc. in the bag of accused no.1, no panchnama at all was immediately made. The evidence led by the prosecution establishes beyond reasonable doubt that accused no. 1 and 4 togetherwith accused no. 2 and 3 were brought to Sami Police Station in a jeep by Jamadar Bhupatsinh. In order to prove its case that accused no.1 was in possession of fire-arms illegally, prosecution has placed reliance on the evidence of Virpal Mafatlal, PW 17, Ex.45, who has signed panchnama Exh.46 indicating seizure of fire-arms from accused no.1. In his examination-in-chief, this witness has stated that when he was summoned at police station as a panch witness, several persons had collected at the police station, and police had informed him that revolver, cartridges, cash, etc. lying there were recovered from accused no.1. In his cross-examination, this witness has clearly deposed that when he reached the police station, revolver, tamanchas, cartridges, etc. were lying on the table. Therefore, the evidence of this witness does not indicate that in his presence, fire-arms were recovered

and seized from the possession of accused no.1. The learned Judge has given cogent and convincing reasons for disbelieving the case of possession of fire-arms by accused no.1. Those reasons are to be found in para 8 of the impugned judgment. Similarly, the prosecution has not adduced any reliable evidence to connect accused no.2,3,4,6 and 7 with the incident in question. Except the fact that they were arrested, nothing is proved by the prosecution to establish their involvement in the incident at all. On overall view of the matter, we are of the opinion that the learned Judge has not committed any error in disbelieving the prosecution case, which is not proved beyond reasonable doubt.

18. The learned Judge has disbelieved the defence of the accused that when they were in search of work, they were apprehended falsely by the police. However, we find that witness Chandubhai in cross-examination has, in no uncertain terms, stated that at the time when accused no. 2 and 3 were apprehended by people of Village Runi, those accused had informed the village people that they should not have been apprehended as they had come in search of work. On the facts and in the circumstances of the case, we are of the opinion that the defence of the accused is probabilised.

19. This is an acquittal appeal in which court should be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent and the learned Addl. Public Prosecutor

has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

20. For the foregoing reasons, we do not see any merits in the appeal. The appeal therefore fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

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